FILE COPY

FILED
MAR 18 1927
WM. R. STANSBURY
CLERK

BRIEF FOR PLAINTIFFS IN ERROR

Supreme Court of the United States

October Term, 1926

No. 492

FOX RIVER PAPER COMPANY, THE PATTEN PAPER COMPANY, LIMITED, THE APPLETON MACHINE COMPANY, AND THE APPLETON MANUFACTURING AND LUMBER COMPANY,

Complainants-Plaintiffs in Error.

vs.

RAILROAD COMMISSION OF WISCONSIN,

Defendant-Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

(32,059)

SUBJECT INDEX

	Page of Brief
Federal Water Power Act not involved	7
Riparian title to water power	9 - 11
State Legislation	9
State decisions	10 - 11
There is a taking	12 - 15
Act not justified as police regulation	15 - 18
Act not justified under power of eminent domain	18 - 22
Respondent's position	22 - 29
Not a salable franchise	29
Object of enactment / Result of enforcement	30 - 32
Soverign cannot sell soverignty	33 - 35
Two decisions directly in point	35 - 6
Remainder of Act Valid	36

CASES CITED

	Page
Arimond vs. G. B. & M. C. Co., 31 Wis. 316, 334-5	13
Attorney General vs. Eau Claire, 37 Wis. 400, 435, 437, 439	29
Barkley vs. Abrahams, 214 Ill. 640, 1-2	17
Barney vs. Keokuk, 94 U. S. 324	11
Bill Posting Co. vs. Atlantic City, 71 N. J. L. 72, 74-5	13
Bittenhaus vs. Johnston, 92 Wis. 588, 599	36
Bonnett vs. Vallier, 136, Wis. 193, 201, 212-3, 199	12, 17, 18
Bostock vs. Sams, 95 Md. 400, 413	12
Boyd vs. U. S. 116 U. S. 616, 635	20
Brown vs. Beatty, 34 Miss. 227, 242	22, 36
Buchanan vs. R. R. Co., 60 Wis. 264, 273-4	14
Buchner vs. Railroad, 56 Wis. 403, 416	14
Burns Nat'l. Bank vs. Dunstan, 265 U. S. 17	30
Butchers' Union vs. Crescent City Co., 111 U. S. 746, 757, 764	13
Canal Commrs. vs. Kempshall, 46 Wend. 404	32
Cary vs. Daniels, 49 Mass. 466, 480	12
Charles River Bridge vs. Warren Bridge, 36 U. S. 420, 571	22
Chicago vs. Gunning System, 214 Ill. 628, 641-2	13
Cohn vs. Wausau Boom Co., 47 Wis. 322	28
Comm. vs. Alger, 61 Mass. 53	27
Comm. vs. Boston Adv. Co., 188 Mass. 348, 351-2-3	13
Comm. vs. Clear View, 256 Pa. 328, 331	13
Comm. vs. P. & R. R., 58 Pa. 26, 50	20
Conn vs. Little Suamico, 74 Wis. 652, 656-7-8	10, 24
Crawford vs. Topeka, 51 Kan. 756, 762-3	13, 17
Fidelity etc. Co. vs. Tafeya, U. S.	30
Fox River F. & P. Co. vs. Kelly, 70 Wis. 287	10
Frost etc. vs. R. R. Comm. of Cal., U. S.	30
Gardner vs. Newburgh, 2 Johns, Ch. 162, 165-6-7	12, 20
Gibbons vs. Ogden, 22 U. S. 1	2
Grand Rapids Booming Co. vs. Jarvis, 30 Mich. 308, 324	13
Grand Rapids vs. Powers, 89 Mich. 94, 113	14, 16, 17
Green Bay & M. C. Co. vs. Kaukauna W. P. Co., 70 Wis. 635	10
Hairston vs. Railway, 208 U. S. 598, 616	19
Hardin vs. Jordan, 140 U. S. 371, 382	11
Hood vs. Finch, 8 Wis. 381, 387	22

Page

Huber vs. Merkel, 17 Wis. 355, 367 19
Illinois Central R. R. vs. Illinois, 146 U. S. 387, 455-460 33
Isom vs. R. R. Co., 30 Miss. 300, 313, 315 22
In re Jacobs, 98 N. Y., 194, 105 13
In re Jacobs, 98 N. Y., 108-9 17
Janesville vs. Carpenter, 77 Wis. 288, 301, 298-9-0 ..... 14, 24, 31
Ex Parte Jentzsch, 124 Cal. 468, 472 17
Johnston vs. Rankin, 70 N. C. 550, 555 20
Jones vs. United States, 48 Wis. 385, 403-4 13
Kaukauna Co. vs. Green Bay Co., 142 U. S. 254, 276 ..... 2, 12
Kaukauna W. P. Co. vs. Green Bay & M. C. Co., 75 Wis. 385 10
In re Kelso, 147 Cal. 609, 612-3 ..... 13, 16
Kimberly & Clark Co. vs. Hewitt, 79 Wis. 333 10
Krueger vs. Telephone Co., 106 Wis. 96, 109 14
Leovy vs. U. S., 177 U. S. 621, 632-3 7
Lumsden vs. Milwaukee, 8 Wis. 485, 494-5 22
Martin vs. Waddell, 41 U. S. 367, 410 7
Mehlos vs. Milwaukee, 156 Wis. 591, 599 18
Miles vs. Iberia Drainage Dist., 239 U. S. 478 30
Monongahela Nav. Co. vs. U. S., 48 U. S. 312, 324 ..... 20, 22
Morgan vs. King, 35 N. Y. 454 ..... 24, 32
Mugler vs. Kansas, 123 U. S. 623, 661 ..... 2, 17, 30
Newton vs. Commissions, 100 U. S. 548, 559 33
Packer vs. Bird, 137 U. S. 661, 669 11
Packet vs. Keokuk, 95 U. S. 80, 89 36
Parker vs. Comm. 178 Mass. 199, 204, 205, 206 12
Pasaic vs. Patterson, 72 N. J. L. 285, 287 13
Penniman's Case, 103 U. S. 714, 716-7 36
Penn Coal Co. vs. Mahon, 260 U. S. 393, 413-4-5-6 ..... 2, 13, 18
Penn R. R. vs. B. & O., 60 Md. 263, 269 ..... 20, 22
Penna vs. Wheeling Bridge Co., 54 U. S. 518, 582-3 7
Penna vs. Wheeling Bridge Co., 59 U. S. 421, 430 7
People vs. Kenney, 96 N. Y. 295, 303 36
People vs. N. Y. etc., 68 N. Y. 71, 76 33
Piper vs. Ekern, 180 Wis. 586, 592, 596 ..... 12, 16, 20
Powers vs. Bears, 12 Wis. 213, 222 22
Presser vs. Ill., 116 U. S. 252, 263 36

Page

Priewe vs. Wis. State L. & Impt. Co., 93 Wis. 534, 543, 550 19, 31
Pullman Co. vs. Kansas, 216 U. S. 56, 70 30
Pumpelly vs. G. B. & M. C. Co., 80 U. S. 167, 177-8 13
Railway vs. Railway, 95 Wis. 561, 568 14
Rossmiller vs. State, 114 Wis. 169, 181 33
Sherman vs. Railroad, 40 Wis. 645, 650 14
Shealy vs. R. R., 72 Wis. 471, 474 14
Shively vs. Bowlby, 152 U. S. 1, 40, 127 ..... 7, 9
Sinnickson vs. Johnson, 17 N. J. L. 129, 145 20
State vs. Benzenberg, 101 Wis. 172, 178 36
State vs. Eau Claire, 40 Wis. 533, 542-3 29
State vs. Froelich, 115 Wis. 32, 42 19
State vs. Gardner, 58 Oh. St. 599, 610 13
State vs. Kreutsberg, 114 Wis. 530, 539 16
Slaughter House Cases, 83 U. S. 36, 87 16
State vs. Redmon, 134 Wis. 89, 102-4-5-6-7-8 ..... 17, 18, 19, 31
State vs. Winkler, 101 Wis. 172, 178 13
Toledo vs. Jacksonville, 67 Ill. 37, 40 16
Town of Lakes vs. Rose Hill Cemetery, 70 Ill. 191, 195 16
Tyler vs. Wilkinson, 4 Mason, 397 24
Unity vs. Burrage, 103 U. S. 447, 459 36
U. S. A. vs. C. D. W. P. Co., 152 Fed. 25, 41 26
U. S. vs. Lynah, 188 U. S. 445, 486, 469, 470, 471 13
Walker vs. Board of Public Works, 16 O. 540, 544 24,32
Water Power Cases, 148 Wis. 124, 144, 145, 151 ..... 4, 10, 14, 16, 20, 32, 36
Water Power Co. vs. Water Commrs., 168 U. S. 349, 358 ..... 7, 9
Watertown vs. Mayo, 109 Mass. 315, 319 18
Welsh vs. Swasey, 214 U. S. 91, 106-107 12
West vs. Fox River P. Co., 82 Wis. 647 10
Whitney vs. Township Board, 171 Mich. 234, 237 16
Wis. Water Co., vs. Winans, 85 Wis. 26, 39-40-41 19
Youngs Case, 101 Va. 853, 863 19

STATUTES

LAWS OF WISCONSIN

	Page
Laws 1841 No. 9	3
Revised Statutes of 1849, Page 34	3
Revised Statutes of 1858, Chap. 41, Sec. 2	3
Sanborn and Berryman Stats. of 1898, Chap. 70, Sec. 1591, Page 1166	3
Statutes of 1925, Sec. 31.01 (2)	3
Laws of Wisconsin, Chap. 755, Laws of 1925, Chap. 31	4
Chapter 72, Laws of 1853, Sec. 3	9
Laws of 1878, Sec. 1597	10
Federal Constitution, 5th Amendment	16
Federal Constitution, 14th Amendment	16
Act. Congress Mar. 3, 1899, Sec. 9, (30 Stat. 1151)	28

TEXT BOOKS

Gould on Waters, Sec. 204	12
Farnham on Waters, Vol. 2, Page 1591, Sec. 471	12
Lewis Em. Dom. V. 2, Sec. 683	20
Cooley Const. Lim. 572	27
Cyc. V. 8 Page 863	16, 27

Supreme Court of the United States

October Term, 1926

No. 492

FOX RIVER PAPER COMPANY, THE PATTEN PAPER COMPANY, LIMITED, THE APPLETON MACHINE COMPANY, AND THE APPLETON MANUFACTURING AND LUMBER COMPANY,

Complainants-Plaintiffs in Error.

vs.

RAILROAD COMMISSION OF WISCONSIN,

Defendant-Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR PLAINTIFFS IN ERROR

This case is pending on a writ of error to the supreme court of the State of Wisconsin to review a determination of that court that a judgment of the circuit court of Dane county shall stand as a final judgment. (R. 1-2). The case is reported in 189, Wis. 626. No opinion on the merits was written by any justice of the supreme court. The judgment of the circuit court was affirmed on account that the participating justices of the Supreme Court were evenly divided, three against three. (R. 27). The opinion of the Circuit Judge, Judge Stevens, is to be found in the supplemental record.

The date of the judgment to be reviewed is April 26, 1926. (R. 26).

The claim of the plaintiffs in error was that Subsection (3) of Section 31.09 of Wisconsin Statutes of 1925 is not in harmony with the provisions of the federal constitution in Articles V and XIV (R. 9, 27-8). The determination of the circuit court of Dane county, affirmed by the Wisconsin supreme court, was to the effect that such statutory provision was in harmony with the federal and state constitutions. (R. 26).

The jurisdiction of this court is invoked under Section 237 of the Federal Code of Procedure under the language, "A final judgment or decree in any suit in the highest court of a State * * * where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the constitution * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

QUESTION

Herein we present one question. That is: Is Subsection (3) of Section 31.09 of the Statutes of Wisconsin in harmony with the Federal Constitution? In other words,—Is it competent to the Legislature to require the owner of water power to abdicate his right to "just compensation" on a future taking for public use as a condition of his using the property until the taking?

Note

Gibbons vs. Ogden, 22 U. S. 1;
Mugler vs. Kansas, 123 U. S. 623;
Kaukauna Co. vs. Green Bay Co., 142 U. S. 254;
Penn. Coal Co. vs. Mahon, 260 U. S. 393.

This question is of great importance to the riparian water power owners of Wisconsin.

FACTS

From 1841 until now the Statutes of the Territory and State of Wisconsin have forbidden the building of any dam across any navigable river "without permission of the Legislature." (1)

The Legislature of the Territory and State from 1841 until 1911 was pestered by riparians seeking legislative permission to dam various streams. Then the Legislature enacted a general Water Power law (Chap. 652, Laws of 1911), declaring the water power of navigable rivers in Wisconsin to be property of the State and stating conditions under which it might be improved and used. This water power law was attacked by riparians and held unconstitutional by the State Supreme Court in an unanimous decision of seven justices, on account that it, this statute, proceeded upon the assumption that the State and not the riparians owned the water powers. (2)

Thereupon the Legislature enacted the present water powers act (3). For parts material to this controversy, see appendix. This law provides for administration by the Railroad Commission. It provides for a certificate of character operating as a permit in three classes of cases.

First Class. Section 31.05. "Application for permits to construct" dams generally.

Note 1.

Laws 1841 No. 9.—R. S. of 1849, Page 34,—R. S. of 1858, Chap. 41, Sec. 2.—Sanborn and Berryman Stats. of 1898, Chap. 70, Sec. 1591, P. 1166.—Statutes of 1925, Sec. 31.01 (2).

Second Class. Section 31.07. "Applications for permits to operate and maintain existing dams."

Third Class. Section 31.13. "Raising or enlarging existing dams."

This case involves a dam of the second class provided for by Section 31.07 which reads as follows: "Any person, firm, corporation or municipality desiring a permit to operate and maintain a dam constructed in or across navigable waters without legislative permission prior to the 10th day of July, 1915, shall file with the Commission a written application therefor setting forth" certain facts.

31.08. "Upon receipt of an application under Section 31.07 procedure shall be had substantially as required by Section 31.06, and if the Commission shall find that such operation and maintenance does not materially obstruct existing navigation or violate other public rights and will not endanger life, health or property, a permit is hereby granted to the applicant."

Section 31.09. "In addition to the requirements of Section 31.05 or Section 31.07, as the case may be, each applicant shall file with his application for a permit the following proposals.

Note 2.

Water Power Cases 148, Wisconsin 124.

Note 3.

Laws of Wisconsin, Chap. 755, Laws of 1925, Chap. 31.

(1) "That the Commission shall value the dam site and also its rights * * *

(2) Audit all outlays * * *

(3) That the permit, if granted, shall be granted and accepted subject to the express condition that the state of Wisconsin, if it shall have the constitutional power, or any municipality, on not less than one year's notice, at any time after the expiration of thirty years after the permit becomes effective, may acquire all of the property of the grantee, used and useful under the permit, by paying therefor, the cost of reproduction in their then existing condition of all dams, works, buildings, or other structures or equipment, used and useful under the permit, as determined by the commission, and by paying in addition thereto the value of the dam site and all flowage rights and other property as determined by the commission prior to the time the permit was granted, as provided in subsection (1), plus the amounts paid out for additional flowage rights, if any, acquired after the valuation made by the commission as provided in subsection (1); and that the applicant waives all right to any further compensation. [*Stats. 1915 s. 1596—9m; 1917 c. 474 s. 10; 1925 c. 222*]

The plaintiffs in error are owners of an existing dam across the Fox River at Appleton (R. 10). This dam was built in 1877-8 and has been maintained ever since (R. 10). The builders supposed they had State authority to build the same (R. 11-12-E.), but we proceed upon the view that they were mistaken. (See Petition R. 10-11-C. & E). On May 21, 1925 they presented to the Railroad Commission their application for a certificate authorizing the rebuilding and maintenance of their dam under Section 37.07 of the Statutes (R. 10 to 16).

In their petition they say that (j) "The rebuilding and enlargement of said dam in accordance herewith

will not materially obstruct navigation or violate other public or private rights or endanger life, health or property." (R. 13).

On May 25, 1925, said Railroad Commission examined such application and found and determined "that the application states the facts required to be stated under Section 31.07 of the Statutes * * * but that the application does not comply with the other requirements of the Statute * * * in that the proposal required under sub-section (3) of said section 31.09 is omitted therefrom."

"Hence the Commission finds that it is without jurisdiction to entertain the application."

"It is therefore ordered, that the application be, and the same is, hereby dismissed without prejudice." (R. 7-8-9-21-22).

This writ of error is to correct the error committed by the Supreme Court of Wisconsin in permitting the erroneous decision of the Dane County Circuit Court confirming the determination of the Railroad Commission to stand.

ASSIGNMENT OF ERROR

(1) The Supreme Court of the State of Wisconsin erred in holding that sub-section 3 of section 31.09 of the Statutes of Wisconsin of 1925 is valid. The validity of said section was denied and drawn in question by plaintiffs on the ground that it was repugnant to the Constitution of the United States and in contravention thereof.

(2) That the Supreme Court of the State of Wisconsin erred in holding and deciding that said section does not violate Article V of the Constitution of the United States.

(3) That the Supreme Court of the State of Wisconsin erred in holding that said section does not deprive the plaintiffs of property, without due process of law as guaranteed by section I of Article XIV of the Constitution of the United States.

(4) The Supreme Court of Wisconsin erred in affirming the decision of the Circuit Court of Dane County, Wisconsin, in failing to reverse said decisions with directions to said court to enter judgment according to the prayer of plaintiff's complaint.

I.

ARGUMENT

FEDERAL WATER POWER ACT NOT INVOLVED

We think the Federal Water Power Act is not involved herein on account that the Federal Government has no proprietary interest in water powers on other than its own lands; and no governmental interest in navigable waters other than that growing out of the Commerce Clause of the Constitution. (4)

In Martin vs. Waddell, Chief Justice Taney says,

Note 4.

Martin vs. Waddell, 41 U. S. 367-410 (1842);

Penna. vs. Wheeling Bridge Co., 54 U. S. 518-582-3 (1851);

Penna. vs. Wheeling Bridge Co., 59 U. S. 421-430 (1855);

Shively vs. Bowlby, 152 U. S. 1-40 (1894);

Water Power Co. vs. Water Comrs., 168 U. S. 349-358 (1897);

Leovy vs. U. S., 177 U. S. 621-632-3 (1899).

> "For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government." (410)

In Shively vs. Bowlby, Mr. Justice Gray says:

> "Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States." (46).

In *Water Power Company vs. Water Com'rs*, Mr. Justice Peckham reaffirms the statement made by Chief Justice Taney in *Martin vs. Waddell* and says among other things,

> "The jurisdiction of the State over this question of riparian ownership has been always, and from the foundation of the government, recognized and admitted by this Court." (366)

The decisions in all the other cases cited in Note 4 are substantially equally emphatic, and to the same effect on this point.

No doubt it is competent to Congress to take charge of, and legislate concerning, the water power, parcel of the public domain.

Prior to the Confederation water powers must have been the property of the riparians or the respective colonies. Hence they still remain such unless transferred to the Federal Government by the Articles of Confederation or the Constitution. Nothing to that effect is to be found in either such Articles or the Constitution other than the Commerce Clause of the Constitution.

Wisconsin was admitted into the Union "on an equal footing with the original states in all respects whatsoever." (9 Stat. 233).

The Federal Supreme Court holds that the states admitted came in with the same rights respecting public navigable waters as the original thirteen states had. (6).

II.

OWNERSHIP OF WATER POWER

Is the riparian the owner of the water power of navigable rivers in the State of Wisconsin as against the State?

State Legislation

In an early day this or some similar question arose in Wisconsin respecting the relative rights of the State and the riparian to such rivers. This matter was settled by Chapter 72, Laws of 1853. Section 3 provides that,

> "The boundaries of lands adjoining waters, and the several and respective rights of individuals, the State, and its citizens, in respect to all such lands and waters, shall be determined in conformity to the common law, so far as applicable as evidenced by judicial determinations in other states, in which the courts in such cases have adhered to its principles."

Note 6.

Shively vs. Bowlby, 152 U. S. 127 (1893);
Water Power Co. vs. Water Comrs., 168 U. S. 349-358-9. (1897).

This statute continued in force unchanged until the Revision of 1878. It was then recast by the Revisers and appears in the Revision of 1878 as Section 1597 and in present Statutes 30.01. (4) (c), in the following language:

> "The boundaries of lands, adjoining waters, and the rights of the state and of individuals in respect to all such lands and waters, shall be determined in conformity to the common law, so far as applicable."

State Decisions

An unbroken line of State decisions maintains the same rule as this statute declares and holds the water powers to be the property of the riparian. (7).

In Water Power Cases, the question was the right of the riparian to the water power as against the State. The decision in favor of the riparian claim was by a unanimous Court of seven Justices.

Note 7.

Fox River F. & P. Co. vs. Kelly, 70 Wis. 287 (1888);

Green Bay & M. C. Co. vs. Kaukauna W. P. Co., 70 Wis. 635 (1888);

Conn vs. Little Suamico, 74 Wis. 652 (1889);

Kaukauna W. P. Co. vs. Green Bay & M. C. Co., 75 Wis. 385 (1890);

Kimberly and Clark Co. vs. Hewitt, 79 Wis. 333 (1891);

West vs. Fox River P. Co., 82 Wis. 647 (1892);

Water Power Cases, 148 Wis. 124 (1912).

This rule of property so emphatically held both by the State legislature and by the State Court, will be enforced by this Court. (8).

In Packer vs. Bird, Mr. Justice Field said,

> "Whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee." (669)

In Hardin vs. Jordan, Mr. Justice Bradley said, respecting the case of Barney vs. Keokuk,

> "we held that it is for the several States themselves to determine this question, and that if they choose to resign to the riparian proprietor rights which properly belong to them, in their sovereign capacity, it is not for others to raise objections." (382)

If there were any doubt about the right of the riparian owner to the water power created by the fall against his land, the State, having adopted a rule, both by Statute and Judicial decision, as between itself and riparians is not at liberty to reverse it at will. If it attempts to do so this Court will continue to follow the rule notwithstanding the departure, as held in Hardin vs. Jordan.

There is abundant uniform authority outside of Wisconsin to same effect. (9).

Note 8.

Barney vs. Keokuk, 94 U. S. 324;

Packer vs. Bird, 137 U. S. 661, 669;

Hardin vs. Jordan, 140 U. S. 371, 382.

III.

THERE IS A TAKING

Preventing the rightful use is a taking. So held in reference to height or character of buildings (9). So held in reference to mining coal or stone (9a). So held in reference to overflowing land (9b). So held in reference to maintenance of billboards (9c). So held in reference to lawful employment (9d). So held in reference to railroad grades (9e). So held in reference to interference with use of highway (9f). So held in reference to occupation of river beds (9g).

In Piper vs. Ekern, Mr. Justice Doerfler says:

> "The value of business property in a business district in a city consists in the right to use the property for business purposes, and any unreasonable police regulation restricting such right, in substance amounts to the taking of private property for a public use without compensation." (593)

Note 9.

Kaukauna Co. vs. Green Bay Co., 142 U. S. 254-276;

Gardner vs. Newburgh, 2 Johns Ch. 162-165-6;

Cary vs. Daniels, 49 Mass. 466, 480;

Gould on Waters, Sec. 204;

Farnham on Waters, Vol. 2, page 1591, Sec. 471.

Note 9.

Piper vs. Ekern, 180 Wis., 586, 593;

Bonnett vs. Vallier, 136 Wis., 193, 212-3;

Welsh vs. Swasey, 214 U. S. 91, 106, 107;

Parker vs. Comm., 178 Mass., 199, 204, 205, 206;

Bostock vs. Sams, 95 Md., 400, 413.

Note 9a.

Penn. Coal Co. vs. Mahon, 260 U. S. 393 at 413-4-5-6;

Comm. vs. Clear View, 256 Pa. 328, 331;

In re Kelso, 147 Cal. 609, 612-3.

Note 9b.

Jones vs. United States, 48 Wis., 385, 403-4;

Arimond vs. G. B. & M. C. Co., 31 Wis., 316, 334-5;

Pumpelly vs. G. B. & M. C. Co., 80 U. S. 167, 177-8;

U. S. vs. Lynah, 188 U. S. 445, 486, 469, 470, 471;

Grand Rapids Booming Co. vs. Jarvis, 30 Mich. 308, 324.

In Comm. vs. Clear View Coal Company, Mr. Justice Walling says:

> "For practical purposes the right to coal consists in the right to mine it." (331)

Note 9c.

Bill Posting Co. vs. Atlantic City, 71 N. J. L. 72, 74-5;

Comm. vs. Boston Adv. Co., 188 Mass. 348, 351-2-3;

Pasaic vs. Patterson, 72 N. J. L. 285, 287;

Chicago vs. Gunning System, 214 Ill., 628, 641-2;

Crawford vs. Topeka, 51 Kan. 756, 762.

Note 9d.

State vs. Winkler, 101 Wis., 172, 178;

In re Jacobs, 98 N. Y., 194, 105;

Butcher's Union vs. Crescent City Company, 111 U. S. 746, 757, 764;

State vs. Gardner, 58 Oh. St., 599, 610.

In Pennsylvania Coal Co. vs. Mahon, Mr. Justice Holmes says:

> "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." (414)

In re Kelso Mr. Justice Angelotti says:

> "A limitation of the use *pro tanto* deprives him of the enjoyment thereof, and any arbitrary action in this regard is a taking of private property without due process of law." (612)

In Bartemeyer vs. Iowa, Mr. Justice Field says:

> "The right of property in an article involves the power to sell and dispose of such article as well as to use and enjoy it. Any act which declares that the owner shall neither sell it nor dispose of it, nor use and enjoy it, confiscates it." (13)

Note 9e.

Buchanan vs. R. R. Co., 60 Wis., 264, 273-4;

Railway vs. Railway, 95 Wis., 561, 568;

Shealy vs. R. R., 72 Wis. 471, 474.

Note 9f.

Krueger vs. Telephone Company, 106 Wis., 96, 109;

Buchner vs. Railroad, 56 Wis., 403, 416;

Sherman vs. Railroad, 40 Wis. 645, 650;

Grand Rapids vs. Powers, 89 Mich., 94, 113.

Note 9g.

Janesville vs. Carpenter, 77 Wis. 288, 301.

See also Water Power Cases 148, Wis. 124, 14.

So much more abundantly in relation to water power. The value of the property is in the use of it. When the owner fails to use it, it is gone forever. The prevention of such use, except upon condition of the abandonment of a constitutional right, is a taking. Unused water power is gone forever, absolutely wasted.

IV.

POLICE POWER

Impounded water is a threat to all that lies between it and tide water. The threat is more or less serious depending on the volume impounded and the strength of the impounding works. But the danger to the public growing out of the impounding thereof is not so great as the advantage of the use thereof. The custom of the civilized world is proof of this fact. The danger, however, puts upon the state the duty of supervision of the impounding works, and upon the owners of such works the duty of obedience to supervision.

The principal advantage of impounded water is the creation of power by the restrained release thereof. The restrained release of impounded water ministers to many of the needs of mankind, while the unrestrained release is a devastating force.

The police power relates only to the moral, physical or mental well being of society.

It has no relation to loss or gain of specific property as such. Its definition is given by divers text writers and judges in divers sets of words, but no set embraces loss or gain of dollars or any representative of dollars. Its basis is the maxim *salus populi suprema lex.* But the people have most deliberately determined that certain rules tend so universally to the well being of the

people that they may not be overridden by the law-making power. These rules we call the constitution. We, the people, have not delegated to the legislators the power to override it. It says:

> "Nor shall private property be taken for public use without just compensation." (Fed. Const. 5th Am'd't.)
>
> "Nor deny to any person * * * the equal protection of the laws." (14th Am'd't.)

The safety of the people may require limitations upon, and conditions of, the use of property. It is the proper function and duty of the law-making power, and of that alone, to state such limitations and conditions. But such law making power cannot, under the guise of police power, invade constitutional right in property.(11) There must be some obvious and real connection between the actual provisions of police measures and their assumed purpose. "The Legislature cannot under the guise of such regulations, arbitrarily invade personal rights or private property." (Cyc. Vol. 8 p. 864).

Note 10.

Piper vs. Ekern, 180 Wis., 586, 592;

State vs. Kreutsberg, 114 Wis. 530, 539;

Slaughter House Cases, 83 U. S. 36, 87;

Grand Rapids vs. Powers, 89 Mich. 94, 113;

Whitney vs. Township Board, 171 Mich., 234, 237;

Water Power Cases, 148 Wis. 124, 145;

Toledo vs. Jacksonville, 67 Ill., 37, 40;

Town of Lake vs. Rose Hill Cemetery, 70 Ill. 191, 195;

In re Kelso, 147 Cal. 609, 612-3.

In town of Lake vs. Rose Hill Cemetery, Justice Scott says:

> "It is essential that such regulations must have reference to the comfort, safety or welfare of society." (195)

When the validity of legislation under the police power depends upon the degree of the encroachment and the exigency of the call, wide latitude should be given to legislative discretion. (12) But there is no room for legislative discretion when the question is one of kind of encroachment and purpose of call. That is for the Court and not for the Legislature. (13).

Whether the restraint imposed by Subsection (3) is justified under the police power is not matter of doubt. The statute challenged forbids the use of the riparian's property unless he will relinquish, or agree to relinquish, his constitutional right to "just compensation." Such condition has no relation to moral, physical or mental well being, the only proper field of police control. (4) It relates only to the terms under which the state may acquire property which it may wish to own or use without giving "just compensation."

Note 11.

State vs. Redmon, 134 Wis. 89, 102-4-5-6-7;

Bonnett vs. Vallier, 136 Wis. 201-2;

Mugler vs. Kansas, 123 U. S. 623, 661;

In re Jacobs, 98 N. Y., 108-9;

Ex parte Jentzsch, 124 Cal. 468, 472;

Barkley vs. Abrahams, 214 Ill. 640-1-2;

Crawford vs. Topeka, 51 Kan. 756, 762-3;

Grand Rapids vs. Powers, 89 Mich. 94, 113.

V.

EMINENT DOMAIN

It can hardly be claimed that the valuation fixed today will be "full compensation" at any time after the expiration of thirty years. True it may be that the discovery of new sources of power will bring about that today's valuation may exceed "full compensation" thirty years hence. But it cannot be said that the chances are even; and if they were even, it would still remain that if the valuation of today should prove to be more than "just compensation" thirty years hence, the state or the municipality may proceed, thirty years hence, to condemn at the then value.

In Penn. Coal Co. vs. Mahon, Mr. Justice Holmes uses these peculiarly fitting words:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use without compensation. * * * When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." (415)

Note 12.

Bonnett vs. Vallier, 136 Wis. 193, 199, 202;

Mehlos vs. Milwaukee, 156 Wis. 591, 599;

State vs. Redmon, 134 Wis. 89, 105, 107;

Penn. Coal Co. vs. Mahon, 260 U. S 393, 412, 416;

Watertown vs. Mayo, 109 Mass. 315, 319.

The market value of water power depends largely on the market value of coal. Suppose many water power owners yield to the duress of subdivision (3) and improve their powers now. Suppose thirty years hence the price of coal is doubled and hence the value of the water power. Then the state may make a fine speculation by taking all such powers at half their value.

The same reasoning applies to increase in value from change in conditions of vicinage, local means of transportation, good or bad times, cost of transmission of power, rates of interest, settled or unsettled social conditions, or the relative value of the dollar.

The assurance that one's property shall not be taken for public use without "just compensation" is fundamental to the well being of society. (14).

In Piper vs. Ekern, Justice Doerfler says:

> "The government of this great state, * * * cannot afford, under the guise of a police regulation, to acquire rights to private property, as is attempted by the act in the instant case, unless under the constitution it is willing to make proper compensation therefor." (596)

Note 13.

State vs. Redmon, 134 Wis. 89, 107-8;

State vs. Froelich, 115 Wis., 32, 42;

Huber vs. Merkel, 17 Wis. 355, 367;

Hairston vs. Railway, 208 U. S. 598, 616;

Youngs Case, 101 Va., 853, 863;

Priewe vs. Wis. State L. & Impt. Co., 93 Wis. 534;

Wis. Water Co. vs. Winans, 85 Wis. 39, 40, 41.

In Monongahela vs. U. S., Mr. Justice Brewer says:

> "For in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government." (324)

In Gardner vs. Newburgh, Chancellor Kent says:

> "I may go further, and show that this inviolability of private property, even as it respects the acts and wants of the state, *unless a just indemnity be afforded,* has excited so much interest, and been deemed of such importance, that it has frequently been made the subject of express and fundamental articles of right in the constitution of government." (167)

In Sinnickson vs. Johnson, Mr. Justice Dayton says:

> "This power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law, that the right to compensation is an incident to the exercise of that power." (145)

Note 14.

Piper vs. Ekern, 180 Wis., 586, 596;

Monongahela Nav. Co. vs. U. S., 148 U. S. 312, 324;

Boyd vs. U. S. 116 U. S. 616, 635;

Water Power Cases, 148 Wis. 124, 144;

Sinnickson vs. Johnson, 17 N. J. L. 129, 145;

Penn. R. R. vs. B. & O., 60 Md. 263, 269;

Comm. vs. P. & R. R., 58 Pa. 26, 50;

Gardner vs. Newburgh, 2 Johns. Ch. 162, 167;

Johnston vs. Rankin, 70 N. C. 550, 555;

Lewis Em. Dom. V. 2, Sec. 683.

In Johnston vs. Rankin, Mr. Justice Rodman says:

> "Notwithstanding there is no clause in the Constitution of North Carolina which expressly prohibits private property from being taken for public use without compensation; * * * yet the principle is so grounded in natural equity, that it has never been denied to be a part of the law of North Carolina." (555)

Chancellor Kent says:

> "This principle in American Constitutional jurisprudence is founded on natural equity, and is laid down by jurists as an acknowledged principle of universal law." (V. 2, p. 409) (339)

In Boyd vs. U. S., Mr. Justice Bradley says:

> "It is the duty of the courts to be watchful of constitutional rights and against any stealthy encroachment thereon." (635).

The scheme of confiscation set up by this statute is not limited to depriving the riparian of increased value of his water power. He is denied all consequential and severance damages that may result from the taking of his water power after the expiration of the thirty-year period. To industrial concerns like the plaintiffs in the case at bar, this denial of these elements of damage may well be ruinous. We refrain from elaborating on this point. Its mere statement is sufficient to shock the conscience of anyone competent to contemplate the consequences of such a situation.

What elements of value go to make up "just compensation" is for consideration of the court and not of the legislature. (15)

VI.

RESPONDENT'S POSITION

The position of the respondent, as disclosed by its brief below, is that the State may demand a price for its consent that the citizen may improve and use his own property. In other words, that since the riparian cannot avail himself of the water power without damming the stream and cannot dam the stream without permission of the legislature, the legislature has for sale its permission to dam the stream and may legally sell or swap the permission for an interest in water power; and that the legislature may rightfully withhold the permission unless the riparian will promise to pay the price as fixed.

Note 15.

Lumsden vs. Milwaukee, 8, Wis. 485, 494-5;

Hood vs. Finch, 8 Wis. 381, 387;

Powers vs. Bears, 12 Wis. 213, 222;

Monongahela Nav. Co. vs. U. S., 148 U. S. 312, 327;

Charles River Bridge vs. Warren Bridge, 36 U. S. 420, 571;

Brown vs. Beatty, 34 Miss. 227, 242;

Isom vs. R. R. Co., 30 Miss. 300, 313, 315;

Penn. R. R. Co. vs. B. & O. R. R. Co., 60 Md. 263, 269.

The State has sovereign control of its navigable rivers through its police power for the purpose of protecting navigation and other public rights, including the protection from escape of impounded water. It has the same sovereign control of all property within its jurisdiction through its police power to prevent such use as shall endanger life, health or property. These sovereign rights are of the same class. Both rest on the fundamental maxim *salus populi suprema lex*—the corner stone of the social fabric.

It is not only the privilege of the sovereign, but its duty as well, to exercise this power. The owner of any property must submit his property to it. More than that, every citizen must submit his body to it. He must submit to quarantine. He must dress properly. This sovereign duty begets the obligation of the riparian, wishing to build a dam, to show that the proposed structure will not interfere with navigation, fishing, or put life or property in danger.

Supposedly governments are formed for the help and not the hindrance of the people. Is it not a violation of the first principles of government that the State should hinder, not help? The State cannot use this power. It is the property of the riparian. Its use would further the interests of the State by employing labor, producing manufactured material and furnishing taxable property.

The Wisconsin riparian does not need any grant of right or power. If his dam is fit in character, he has the right, the statutory prohibition to the contrary notwithstanding. (15).

Herein he asserts that fitness. The petition declares "Said dam is weak. The rebuilding and enlargement of said dam in accordance herewith will not materially obstruct navigation or violate other public or private rights or endanger life, health or property." (R. 13 J.), (Ante p. 5-6).

He only asks that his dam be examined under the police supervision and its fitness or unfitness determined and declared.

In Conn. vs. Little Suamico, involving a dam built without legislative permission, Justice Cole says of the riparian, "He may use the stream and its banks for every purpose not inconsistent with the public use." (656). He further says, "but if the owner uses the stream in the qualified manner above indicated, the public can not complain." (658).

The charge of the trial court approved by the court of review says, "The defendants' mill dam was not an unlawful structure; the defendants had a right to build and maintain it under certain restrictions." (663).

Further, Justice Cole says, "If the beneficial use of the river was not materially affected or abridged by them, neither the public nor the plaintiff had any just ground to complain of their existence." (669).

Note 15.

Janesville vs. Carpenter, 77 Wis. 288, 300, 301;

Conn. vs. Little Suamico, 74 Wis. 651, 656-7-8;

Tyler vs. Wilkinson, 4 Mason 397;

Morgan vs. King, 35 N. Y.;

Walker vs. Board of Public Works, 16 O. 540, 544.

In Janesville vs. Carpenter, Justice Orton says, "This statute makes it unlawful for the defendant who owns this ground and has the right to use it * * * to drive piles into it anywhere within the river for any purpose. It prevents the lawful use of his property. It takes it away from him without compensation or due process of law and denies the defendant the equal protection of the laws." (301).

"Further, the Legislature usurp the judicial power of the courts by the enactment of this statute. It adjudicates an act unlawful and presumably injurious and dangerous which is not, and can not be made to be so without a violation of the constitutional rights of the defendant. * * * It reverses many decisions of this court on the questions involved in it and which have the effect of judicial determination of the defendants' rights of property." (601-2).

So with the builder in the City. He has the land and has the right to build. But the police power requires that the fitness of the building be determined in advance. Can the State or the City claim a share of the property as a condition of the giving of the certificate of fitness?

The owner of gun powder or dynamite asks the police power where he may store it. Can the City or State demand a share of the powder for pointing out a fit place for storage? If so, what share?

Judge Stevens says:

> "If the Legislature refuses to grant the requested franchise for a dam, the riparian owner has been denied no constitutional right. The riparian owner must submit."

Let us call a spade a spade and paraphrase thus: If the State chooses, it may forbid the use by the riparian of his own property and the riparian has no remedy, because the State is sovereign. Judge Stevens says, the sovereign may say to the subject though you own this property and hence the State cannot use it, the State has the power to prevent its use and therefore you shall not use it. To the contrary see note 5.

The proposition is revolutionary. If the riparians were in the majority in the community, the proposition would threaten civil war. There are millions of dollars worth of water power unimproved in the navigable rivers of Wisconsin and there are many riparians owning such power.

Suppose a legal representative of the legislature, the City of Milwaukee for instance, should refuse to examine the building plans of the land owner, or on examination, should arbitrarily refuse a permit, and such refusal should be sustained by the Courts, how long could the social fabric withstand such an assault?

In the fable, the dog could not eat the hay, but could prevent the ox's eating it. If the ox could have given the dog a bone, perhaps the dog would have left the hay to the ox. Can the State play the dog?

In U. S. A. vs. C. D. W. P. Co., (152 Fed. 25 at 41) Judge Severens says:

> "It derogates from the dignity and character of the government to suppose that, formed as it is to secure impartial justice between individuals, it may nevertheless, in the conduct of its own affairs, without regard to the principles it represents, perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another."

Judge Stevens says:

> "The rights of riparian owners to use the waters of navigable streams are in strict subordination to these rights of the public."

What property does any citizen own which is not "in strict subordination to these rights of the public" under the police power? The police power says *salus populi suprema lex.* (16).

In Commonwealth vs. Alger, Chief Justice Shaw says:

> "We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, or injurious to the rights of the community." (84-5).

This language of Chief Justice Shaw is quoted with approval by Cooley (572-3).

Similar language is to be found in substantially all text books on the topic and in innumerable judicial opinions.

The principle is fundamental.

Note 16.

Comm. vs. Alger, 61 Mass. 53;

Cooley Const. Lim. 572;

Cyc. V. 8, page 863 866E.

Judge Stevens further says the right to build any structure in the navigable waters "is subordinate to the public use and may be regulated or prohibited by law", quoting from Cohn vs. Wausau Boom Co., 47 Wis. 322. But the right to build any structure in any of the navigable waters of the United States "is subordinate to the public use for navigation", the supervision of which rests in the Federal Government under the Commerce Clause of the Federal Constitution. But water power dams may be built therein "provided the location and plans thereof are submitted to, and approved by the Chief of Engineers and by the Secretary of War." (17).

Federal Statutes say:

> "Such structures may be built under authority of the legislature of a state .* * * provided the location and plans thereof are submitted to and approved by the Chief of Engineers and the Secretary of War before construction is commenced."

Does it follow that the United States may take a share of the value of the riparian property for its certificate of fitness of the dam? What share may the United States take for its certificate, and what the State for its certificate, and what, if anything, may the riparian retain on account of his ownership of the property?

Suppose the Federal Statute had proceeded with a further clause that the certificate should issue and the dam be constructed only upon the payment of one-third of the value of the water power? How would that sound?

Note 17.
Act. Mar. 3, 1899, Sec. 9, 30 Stat. 1151.

Suppose Section 31.09 (3) had, instead of the agreement relating to the taking of his property by the State, provided that the riparian should pay one-third of the value of the water power as determined under 31.09 (1) and (2), as a condition precedent to the issuing of the certificate of fitness for building of the dam?

VII.

FRANCHISE

Respondent's entire argument is substantially that the State sells to the riparian the permission to build a dam. This it erroneously calls a franchise. By all definitions a grant to be a franchise must carry a gem from the crown. It must give a right to do what otherwise can only be done by the sovereign. In the instant case, the right sought is to build a dam for water power for private use only, on the land of the riparian. True it rests with the sovereign under the police power to say if the proposed dam is fit. But the building of a dam for power is not a sovereign function. In fact, the sovereign, Wisconsin itself, cannot build a dam for power except for State purposes. (18). The Water Power Act itself proceeds upon the basis that the State cannot build or buy a water power dam. It provides "That the State of Wisconsin, if it shall have the constitutional power, may acquire all of the property of the grantee" etc. (31.09) (3).

The riparian alone has the right to build the water power dam. How can the State grant a franchise to do what the State itself cannot do? Can the stream rise higher than the fountain?

Note 18.

Attorney General vs. Eau Claire, 37 Wis., 400, 435, 437, 439; State vs. Eau Claire, 40 Wis. 533, 542-3.

VIII.

OBJECT OF ENACTMENT
RESULT OF ENFORCEMENT.

No enactment can be valid, the enforcement of which takes away the fundamental rights of the citizen. Judging of the validity of statutes, the court will consider the legislative intent and result of enforcement.

States can not impinge upon private right indirectly where they can not directly. They can not abridge private rights under pretense of serving public rights. (19).

In Frost vs. R. R. Comm. of Cal., Mr. Justice Sutherland says,

> "It would be a palpable incongruity to strike down an act of state legislation which by words of express divestment seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state otherwise threatens to withhold."

In Pullman Co. vs. Kansas, Chief Justice White says, "the controlling influence of the constitution may not be destroyed by doing indirectly what can not be done directly."

Note 19.

Miles vs. Iberia Drainage Dist. 239 U. S. 478;

Mugler vs. Kansas, 123 U. S. 623, 661;

Pullman Co. vs. Kansas, 216 U. S. 56, 70;

Frost, etc. vs. R. R. Comm. of Cal. — U. S. —;

Fidelity, etc., Co. vs. Tafeya — U. S. —;

Burns Natl. Bank vs. Dunstan, 265 U. S. 17.

The Supreme Court of Wisconsin has heretofore been foremost in declaring this rule. (20).

In State vs. Redmon, Justice Marshall says, "no enactment is controlling if the tribunal created by the constitution to pass upon its character cannot reasonably escape the conclusion that the paramount law condemns it." (107). "A law is not necessarily one to promote public health and comfort of people generally, or a legitimate class thereof, merely because such is its declared purpose." (107).

State vs. Redmon, 134 Wis. 89, 107;

Janesville vs. Carpenter, 77 Wis. 288, 298-9-0.

In Fidelity & Co. vs. Tafeya, Mr. Justice ——— says, "Acts generally lawful may become unlawful when done to accomplish an unlawful end. (—).

In Burns Nat'l. Bank vs. Dunstan, Mr. Justice ——— says, "The states cannot use their most characteristic powers to reach unconstitutional results." (—).

In 1911, the politicians of Wisconsin sought popularity through an attempt to take to the State the water powers of the navigable rivers theretofore declared by uniform legislation and judicial decision to be the property of the riparian.

In that year, the Legislature enacted that the burdens theretofore resting on streams navigable as theretofore understood should thereafter rest on all streams "navigable for any purpose whatsoever." (1911, Chap. — (652).

Note 20.

Priewe vs. Wis. St. L. & I. Co., 93 Wis. 543, 550;

This provision was no doubt void on account that no provision was made for "just compensation" on account of this added burden for public use (21), or on account of the declaring of water power of such streams to be the property of the State.

The same Legislature enacted a "Water Powers Act" declaring the water powers of streams navigable "for any purpose whatsoever" to be the property of the State. On contention of the riparian, this declaration was held void by an unanimous court of seven judges. (22).

The next Legislature enacted the statute herein challenged.

Evidently the legislative intent was to take the riparians water power from the riparian owner, for the use of the State, without "just compensation." There could be no other object of the enactment and no other result of enforcement.

Note 21.

Morgan vs. King, 35 N. Y.;

Walker vs. Board of Public Works, 16 O. 540, 544;

Canal Commis. vs. Kampshall, 26 Wend. 404.

Note 22.

The Water Power Case, 148 Wis. 124.

IX.

SOVEREIGN CANNOT SELL SOVEREIGNTY

In this matter the State is acting as a sovereign and dealing with its trust estate and its police power. Esau sold his birth-right for a mess of pottage; but was the sale valid as against his heirs? (23).

In Rossmiller vs. State, Justice Marshall says:

> "It has not been supposed that the State could deal with public waters, or with any other thing upon a like trust to that of such waters, as the proprietor thereof,—that any such thing could be treated in any respect as the absolute property of the State, and used for purposes of revenue." (181)

In Illinois Central Railroad vs. Illinois, Mr. Justice Field says:

> "The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.
>
> This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested." (455-6).

Note 23.

Rossmiller vs. State, 114 Wis. 169, 181;

Illinois Central R. R. vs. Illinois, 146 U. S. 387, 455 to 460.

People vs. N. Y. etc., 68 N. Y. 71, 76;

Newton vs. Commissions, 100 U. S. 548, 559.

In Newton vs. Commissioners, Mr. Justice Swayne says:

> "Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecesors. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil." (559).

* * *

Or could the State in the person of the Attorney General declare that the State, in the person of the Railroad Commission, had made an untrue certificate, but a certificate for which the State had received its price."

Suppose the Attorney General, or the Governor, should in pursuance of his duty, examine one of the dams maintained under this section and conclude that the finding of the Railroad Commission was erroneous, and that same did materially obstruct existing navigation or endanger life, health or property. What would then be the situation? Would the State have lost its sovereign power to protect the public?

X.

DECISIONS IN POINT

Frost vs. R. R. Comm. of Cal. — U. S. —, is substantially parallel to the instant case. Therein Mr. Justice Sutherland says:

> "The naked question which we have to determine therefore is whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so. Upon the answer to this question, the constitutionality of the statute now under review will depend." (—).
>
> "In reality the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." (—).
>
> "It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such condition as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights." (—).
>
> "And the principle, that a state is without power to impose an unconstitutional requirement as a condition for granting a privilege, is broader than the applications thus far made of it." (—).

This decision is more forceful in its application to the instant case on account that, contrary to the supposition that the State of California had authority to

forbid the plaintiff in error the use of the streets, the State of Wisconsin has not the authority to refuse to the riparian the privilege of building his dam under the conditions stated in the application.

The Wisconsin statute is more mischievous than the California statute. The California statute forbids the citizens to use the property of the public at public expense, while the Wisconsin statute forbids the citizen to use his own property, thereby preventing his own gain and the gain of the public as well.

In the Water Power Cases, Justice Timlin says:

> "All the police power of the State is applicable to such property and the enjoyment thereof. But such incorporeal riparian rights are not, as against the riparian owner, subject or subordinate to any salable or demisable right of the State, or to any claim of the State for compensation therefor." (145).

XI.

REMAINDER OF ACT VALID

The remainder of the Water Powers Act, subtracting subsection (3), seems to us to be valid. If so it must stand though subsection (3) falls. (24).

Respect for the legislature of 1914-15 forbids the idea that it would deprive the water power owners of the State of the use of their property except upon condition that they abdicate their constitutional right to "just compensation." This is what that legislature would have done if it had refused to enact the Water Power Act unless subsection (3) were included therein.

Note 24.

State vs. Benzenberg, 101 Wis., 172, 178;
Bittenhaus vs. Johnston, 92 Wis. 588, 599;
Water Power Cases, 148 Wis. 124, 151;
Packet Co. vs. Keokuk, 95 U. S. 80, 89;
Penniman's Case, 103 U. S. 714, 716-7;
Unity vs. Burrage, 103 U. S. 447, 459;
Presser vs. Ill., 116 U. S. 252, 263;
People vs. Kenney, 96 N. Y. 295, 303;
Brown vs. Beatty, 34 Miss. 227, 242.

March 12, 1927.

JOHN F. KLUWIN and
EDW. J. DEMPSEY,
Attorneys for Plaintiffs in Error.

MOSES HOOPER,
of Counsel.

APPENDIX 14

31.01 Definitions.
31.02 Powers of the railroad commission.
31.03 Public utilities law applicable.
31.04 Permits to develop power.
31.05 Applications for permits to construct.
31.06 Hearing.
31.07 Applications for permits to operate and maintain existing dams.
31.08 Hearing.
31.09 Proposals to accompany applications.
31.10 Permit not to be valued.
31.11 Certificate of terms and forfeiture of permits.
31.12 Map, profile and plans.

31.01. Definitions. **Terms used in this chapter are defined as follows:**

(1) "Commission" means the railroad commission of Wisconsin.

(2) "Navigable waters" means all waters declared navigable by chapter 30 of these statutes.

(3) "Permit" means legislative permission granted under section 31.06 to construct, operate and maintain a dam in or across navigable waters, or under section 31.08 to continue the operation and maintenance of any dam so situated which was constructed before such legislative permits were required.

(4) "Grantee" means the person, firm, corporation or municipality to whom a permit is granted, and all subsequent owners of the grant.

(5) "Corporation" means a private corporation organized under the laws of this state.

(6) Municipality" means any town, village, city or county in the state. [*Sts. 1915 s. 1596—1; 1917 c. 474 s. 2*]

31.02 Powers of the railroad commission. (1) The commission, in the interest of public rights in navigable waters or to promote safety and protect life, health and property is empowered to regulate and control the level and flow of water in all navigable waters and may erect, or may order and require bench marks to be erected, upon which shall be designated the maximum level of water that may be impounded and the lowest level of water that may be maintained by any dam heretofore or hereafter constructed and maintained in navigable waters; and shall establish and maintain gauging stations upon the various navigable waters of the state and shall take other steps necessary to determine and record the characteristics of such waters.

(2) The commission is vested with authority and power to investigate and determine all reasonable methods of construction, operation, maintenance, and equipment for any dam so as to conserve and protect all public rights in navigable waters and so as to protect life, health and property; and the construction, operation, maintenance and equipment, or any or all thereof, of dams in navigable waters shall be subject to the supervision of the commission and to the orders and regulations of the commission made or promulgated under the provisions of this chapter of the statutes.

(3) The commission or any member or any agent or employe thereof shall at all times be accorded free access to any and all parts of any dam and appurtenances constructed or maintained in navigable waters.

(4) The commission may order and require any dam heretofore or hereafter constructed to be equipped and operated, in whole or part, as follows:

(a) With slides and chutes for the passage of logs and timber products.

(b) With a lock, boat hoist, marine railway or other device of a size and construction sufficient to accommodate navigation.

(c) With good and sufficient fishway or fishways.

(d) With spillways or flood gates capable of permitting the passage through or over the same of freshets and floods during all seasons of the year.

(e) With booms, piers or other protection works ample to safeguard flood gates from trash or other floating material.

(5) The commission, whenever consistent with public rights, is authorized and empowered to make contracts for the removal of any material from the bed of any navigable lake, to fix and determine the compensation to be paid to the state of Wisconsin for material so removed, and to enter into contracts, on behalf of the state of Wisconsin, for the lease or sale of such material, with such conditions as may be necessary for the protection of the public interests and the interests of the state of Wisconsin, provided that no such contract shall be made to continue for a longer period than five years. [*Stats. 1915 s. 1596—2; 1917 c. 474 s. 3; 1923 c. 410*] Annotated †

31.03 Public utilities law applicable. In exercising its powers and performing its duties under this chapter the commission shall be guided and controlled also by the powers with which it is invested by sections 196.01 to 197.10, so far as such sections are applicable. [*Stats. 1915 s. 1596—3; 1917 c. 474 s. 4*]

31.04 Permits to develop power. Permits to construct, operate and maintain dams may be granted to persons, corporations or municipalities under the provisions of this chapter. [*Stats. 1915 s. 1596—4, 1596—5; 1917 c. 474 s. 5; 1925 c. 222*]

31.05 Applications for permits to construct. Any person, firm, corporation or municipality desiring a permit to construct, operate and maintain a dam shall file with the commission a written application therefor, setting forth:

(1) The name of the navigable waters in or across which a dam is proposed to be constructed and a specific description of the site for the proposed dam.

(2) The purpose or purposes for which the proposed dam is to be constructed, operated and maintained.

(3) In case the application is for a permit to construct, operate and maintain a dam for a private purpose or purposes, evidence that the described dam site is owned by the applicant.

(4) A general description of the proposed dam, of the material to be used in the construction thereof, and a general description of all booms, piers, and other protection works to be constructed in connection therewith.

(5) The approximate amount of hydraulic power that the proposed dam is capable of developing.

(6) The location of the nearest city or village and of the nearest existing dam above and below the site of the proposed dam.

(7) A map on the scale of not less than four inches to the mile showing the lands that may be affected by the construction, operation or maintenance of the proposed dam, or by any flowage that may be caused thereby and approximately the outline of such flowage, which map shall indicate the ownership of each tract of land within the flowage.

(8) Such additional information of any nature that may be required by the commission. [*Stats. 1915 s. 1596—6; 1917 c. 474 s. 6; 1925 c. 222*] Annotated †

31.06 Hearing. (1) Upon receipt of an application for a permit the commission shall fix a time, not more than eight weeks thereafter, and a convenient place, for a public hearing thereon; it shall also give notice of such time and place to the applicant who shall cause the same to be published once each week for three successive weeks before such hearing in at least one newspaper, designated by the commission, in each county in which riparian lands will be affected by the proposed dam.

(2) In addition to such publication the applicant, not less than twenty days prior to such hearing, shall mail to every person interested in any lands that will be affected by the proposed dam and whose post-office address can by due diligence be ascertained, notice of the time and place set for such hearing. This notice shall be accompanied by a general statement of the nature of the application and shall be forwarded to such persons by registered mail in a sealed and postpaid envelope properly addressed. Proof of such publication and notice shall be filed, with the commission.

(3) At such hearing or any adjournment thereof the commission shall consider the application, and shall take evidence offered by the applicant and other

persons in support thereof or in opposition thereto, may require the amendment of the application, and if it shall appear that the construction, operation or maintenance of the proposed dam will not materially obstruct existing navigation or violate other public rights and will not endanger life, health or property, the commission shall so find and a permit is hereby granted to the applicant. [*Stats. 1915 s. 1596—7; 1917 c. 474 s. 7*]

31.07 Applications for permits to operate and maintain existing dams. Any person, firm, corporation or municipality desiring a permit to operate and maintain a dam constructed in or across navigable waters without legislative permission prior to the tenth day of July, 1915, shall file with the commission a written application therefor setting forth:

(1) The name of the navigable waters in or across which such dam was constructed and a specific description of the dam site.

(2) The year in which the construction of the dam was completed, and a detailed description of the dam and equipment, including the maximum height or head of water that may be maintained thereby and the kind and character of material of which the dam is constructed.

(3) The purpose for which the dam was theretofore operated and is operated at the time application hereunder is made, and the purpose for which it is proposed to operate and maintain the dam.

(4) The approximate amount of hydraulic power developed thereby.

(5) The location of the nearest city or village and of the nearest existing dam above and below the dam site.

(6) Such additional information of any nature whatsoever as may be required by the commission. [*Stats. 1915 s. 1596—8; 1917 c. 474 s. 8*] Annotated †

31.08 Hearing. Upon receipt of an application under section 31.07 procedure shall be had substantially as required by section 31.06, and if the commission shall find that such operation and maintenance does not materially obstruct existing navigation or violate other public rights and will not endanger life, health or property, a permit is hereby granted to the applicant. [*Stats. 1915 s. 1596—9; 1917 c. 474 s. 9*]

31.09 Proposals to accompany applications. Each applicant for a permit to construct, operate and maintain a dam for the purpose of developing power or for the purpose of aiding in the development of power by other dams through the creation of reservoirs or otherwise, and each applicant for a permit to construct, operate and maintain a dam for any other purpose whatsoever, which is capable of developing fifty theoretical horse power or more available for fifty per cent of the time throughout the year, shall file with his application for a permit, in addition to the requirements of section 31.05 or section 31.07, as the case may be, the following proposals:

(1) That the commission prior to the time the permit is granted shall value the dam site and all flowage rights and other property necessary for the purposes set forth in the application for the permit, whether the same or any part thereof are owned by the applicant or not.

(2) That the commission shall audit all outlays for property and for the construction of the dam, buildings, and other structures and works constructed, maintained, and operated and used and useful under the permit.

(3) That the permit, if granted, shall be granted and accepted subject to the express condition that the state of Wisconsin, if it shall have the constitutional power, or any municipality, on not less than one year's notice, at any time after the expiration of thirty years after the permit becomes effective, may aacquire all of the property of the grantee, used and useful under the permit, by paying therefor, the cost of reproduction in their then existing condition of all dams, works, buildings, or other structures or equipment, used and useful under the permit, as determined by the commission, and by paying in addition thereto the value of the dam site and all flowage rights and other property as determined by the commission prior to the time the permit was granted, as provided in subsection (1), plus the amounts paid out for additional flowage rights, if any, acquired after the valuation made by the commission as provided in subsection (1); and that the applicant waives all right to any further compensation. [*Stats. 1915 s. 1596—9m; 1917 c. 474 s. 10; 1925 c. 222*]

31.10 Permit not to be valued. Each and every permit is granted, and shall be conclusively deemed to be accepted, subject to the condition that no element of value whatever shall ever attach to or be allowed for such permit in and of itself in the sale or acquisition of the property used and useful under such permit or otherwise. [*Stats. 1915 s. 1596—10; 1917 c. 474 s. 11*]

31.11 Certificate of terms and forfeiture of permits. The commission shall issue to every grantee of a permit a certificate evidencing a grant of the permit allowed by law. Every permit, and every franchise heretofore granted by the legislature, to construct, main-

tain and operate a dam shall become null and void, unless the dam thereby authorized be completed within five years from the time when the permit or the franchise was granted; but the commission, for good cause, may extend such time for a period not exceeding two years. [*Stats. 1915 s. 1775c; 1917 c. 474 s. 11*]

31.12 Map, profile and plans. (1) The grantee of a permit under section 31.06, to construct, maintain and operate a dam, before commencing any work of construction authorized by the permit, shall submit to the commission a complete map and profile on the scale of not less than one inch per thousand feet showing the land that may be affected by the construction and maintenance of the dam, or by any flowage that may be caused thereby, and the outline of the flowage, and such other hydrographic and topographic data as the commission may prescribe, and shall also file complete detailed plans and specifications for the proposed dam, including all booms, piers, or other protection works.

(2) The commission shall examine the map, profile, plans and specifications; shall hear the grantee thereon and may reject the same or any part thereof, if unsatisfactory or incomplete, or may suggest and require modifications thereof. If the map, profile and plans and specifications are satisfactory and complete, or, if the same shall be modified as suggested and required, the commission shall so find and approve the same, and thereupon the grantee shall have authority to construct the proposed dam in accordance therewith, but the commission may, at any time during the construction of any dam and in the interest of the public

safety, or of any public rights in navigable waters, authorize, order or require such changes in the plans and specifications and the construction of the dam as shall be necessary.

(3) If the commission, in the case of an application for a permit to construct a dam with a capacity of less than two hundred fifty hydraulic horse power at ordinary stage of water, shall find that the information and data furnished in the original or amended application is sufficient, the applicant shall not be required to furnish the additional or more detailed information or data specified in subsections (1) and (2) of this section. The commission may, however, at any time during the construction of any such dam authorize, order or require changes in the construction or the method or plan of construction thereof, as provided in subsection (2) of this section.

(4) Within ten days after the completion of any dam the grantee shall file with the commission a verified statement that the same was constructed in accordance with the plans and specifications approved by the commission; or in case no plans and specifications were required to be filed, then that the dam was constructed in accordance with the description contained in the application. [*Stats. 1915 s. 1596—11; 1917 c. 474 s. 12*]